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CNP Mechanical, Inc. and U.A. Plumbers and Pipefitters Local Union # 13. Case 3–CA–23731–2

May 31, 2006

DECISION AND ORDER

BY MEMBERS SCHAUMBER, KIRSANOW, AND WALSH

On June 24, 2004, Administrative Law Judge Margaret M. Kern issued the attached decision. The Respondent filed exceptions, and the General Counsel and the Charging Party filed answering briefs. The Respondent filed separate replies to the answering briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs, and has decided to affirm the judge's rulings, findings,¹ and conclusions² and to adopt the recommended Order as modified.³

¹ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings. Member Schaumber does not rely on the judge's reference to CNP President Natalello's "undisguised dislike for the Union" and for Union Organizer Caternolo as a basis for discrediting Natalello, but finds the judge's credibility resolutions supportable on the record as a whole.

² Member Schaumber would find that, notwithstanding the Respondent's antiunion animus, the Respondent did not unlawfully refuse to hire or consider Union Business Agent James Caternolo because Caternolo "disparaged" the Respondent's business by informing the Respondent's customers that the Respondent performed substandard work. However, aside from the claim made by the Respondent's president, Natalello, whose testimony the judge discredited, the Respondent has presented no evidence that it relied upon those remarks when it refused to hire or consider Caternolo, i.e., that it singled him out on that basis, as opposed to refusing to hire or consider him based on his union membership, as it did with his fellow union applicants. Thus, we find that Caternolo's remarks provide no defense to the Respondent's failure to hire or consider him.

Contrary to the judge and his colleagues, Member Schaumber does not find that the Respondent's refusal to hire or consider James Caternolo violated Sec. 8(a)(3). Caternolo testified that he contacted at least two school districts where the Respondent was awarded contract bids and told district officials that the Respondent had performed standard plumbing work, and Natalello testified that he knew about Caternolo's disparaging remarks. In Member Schaumber's view, Caternolo's accusations are unprotected under Sec. 7. The accusations were not "for mutual aid and protection" of employees the Union represented or hoped to represent. Nor are they related to employees' interests. See, e.g., *Waters of Orchard Park*, 341 NLRB 642, 643–644 (2004) (nurses' complaints to state agency on behalf of patients were not related to employees' interests and thus not encompassed by "mutual aid

REMEDY⁴

The judge found that the Respondent refused to hire or consider for hire 11 discriminatees, and in the remedy and order sections of her decision, the judge instructed the Respondent to offer reinstatement and other make-whole remedies to all 11 discriminatees. This remedy does not conform to current Board law, and we therefore modify the judge's remedy, Order, and notice.

Under the Board's decision in *FES*, 331 NLRB 9, 14 (2000),⁵ "[i]f the General Counsel is seeking a remedy of reinstatement and backpay based on openings that he knows or should have known have arisen prior to the commencement of the hearing on the merits, he must allege and prove the existence of those openings at the unfair labor practice hearing." The Board further stated, "Where the number of applicants exceeds the number of available jobs, the compliance proceeding may be used to determine which of the applicants would have been hired for the openings." *Id.* The remaining discriminatees are due the remedy for refusal to consider for hire, including "a cease and desist order; an order to place the discriminatees in the position they would have been in, absent discrimination, for consideration for future openings and to consider them for the openings in accordance with nondiscriminatory criteria; and an order to notify the discriminatees, the charging party and the Regional Director of future openings in positions for which the discriminatees applied or substantially equivalent positions." *Id.* at 15.

The record in this case proves that the General Counsel knew or should have known of three openings available prior to the hearing. We therefore defer to the compliance stage the determination as to which discriminatees must be offered reinstatement and backpay. The Respondent has been ordered to reinstate Trevor Claffey to one of those three positions, and Claffey is presumptively entitled to reinstatement with backpay pending a contrary

and protection" clause); see also *Eastex, Inc.*, 437 U.S. 556, 568 (1978) (holding that, at some point, the relationship between an activity and employees' interests becomes so attenuated that the activity is no longer "for mutual aid and protection"). The undisputed fact that Caternolo disparaged CNP to school district officials, an act unassociated with any protected activity, and that Natalello knew about the remarks, is sufficient to establish that the Respondent had a legitimate, nondiscriminatory reason not to hire or consider Caternolo.

³ The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

⁴ We adopt the judge's order requiring that the Respondent reinstate Trevor Claffey and make him whole for any loss of earnings or other benefits. We note, however, that the Respondent may litigate this remedy at the compliance stage of the proceeding based on Claffey's refusal, on July 19, 2002, to accept the Respondent's unconditional offer of reinstatement. See *Solvay Iron Works*, 341 NLRB 208 (2004).

⁵ *Enfd.* 301 F.3d 83 (3d Cir. 2002).

determination at the compliance stage.⁶ If Claffey is reinstated, then the compliance stage should determine which 2 of the 11 discriminatees would have been hired to the remaining 2 positions. If it is determined that Claffey is not due reinstatement, then 3 of the 11 discriminatees are due instatement. The remaining discriminatees are due remedies for refusal to consider for hire, as stated above.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and orders that the Respondent, CNP Mechanical, Inc., Hilton, New York, its officers, agents, successors, and assigns, shall take the actions set forth in the Order as modified below.

1. Substitute the following for paragraph 2 of the judge's Order.

"2 Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this order, offer Trevor Claffey full reinstatement, to the extent that it has not already done so, to his former job, or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Offer instatement to the appropriate discriminatees from the following list, as determined in the compliance stage of this proceeding should have been hired, to the available positions for which they applied, or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges: James Boehler, Stephen Catalina, James Caternolo, Steve Cirrincione, Lonnie Keys, Harry Moses, Robert Muller, John Perticone, Keith Warren, Richard Williams, and William Yatteau.

(c) Make whole the discriminatees identified in the compliance stage of the proceeding as being entitled to reinstatement and/or instatement into the three available positions for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the judge's decision as amended by the remedy section of this decision.

(d) Notify in writing the Regional Director, the Charging Party, and any of the above discriminatees not offered instatement when openings arise, and consider them in a nondiscriminatory manner for these positions

until such time as the Regional Director determines that the case should be closed.

(e) Within 14 days from the date of this order, remove from its files any reference to the unlawful discharge of Trevor Claffey, and within 3 days thereafter notify him in writing that this has been done and that the discharge will not be used against him in any way.

(f) Within 14 days from the date of this order, remove from its files any reference to the unlawful refusal to hire, or consider for hire, James Boehler, Stephen Catalina, James Caternolo, Steve Cirrincione, Lonnie Keys, Harry Moses, Robert Muller, John Perticone, Keith Warren, Richard Williams, and William Yatteau, and within 3 days thereafter notify them in writing that this has been done and that the refusal to hire or consider for hire will not be used against them in any way.

(g) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic fashion, necessary to analyze the amount of backpay due under the terms of this Order.

(h) Within 14 days after service by the Region, post at its office in Hilton, New York, and at all of its jobsites, copies of the attached notice marked "Appendix."⁷ Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 19, 2002.

⁶ Claffey was originally hired to, and then discharged from one of the three available positions. To reinstate Claffey and 3 of the 11 discriminatees would fill 3 positions with 4 employees. Such a result is inconsistent with *FES* (discussed above) and would be punitive rather than remedial.

⁷ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(i) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.”

2. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. May 31, 2006

Peter C. Schaumber,	Member
Peter N. Kirsanow,	Member
Dennis P. Walsh,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD
APPENDIX
NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join or assist a union.

Choose representatives to bargain with us on your behalf.

Act together with other employees for your benefit and protection.

Choose not to engage in any of these protected activities.

WE WILL NOT tell our employees or employee-applicants that our policy restricting job applicants from entering our premises is the way that we remain nonunion.

WE WILL NOT interrogate our employees or employee-applicants about their union activities.

WE WILL NOT tell our employees or employee-applicants that they should not talk to, or accept literature from, union representatives.

WE WILL NOT threaten our employees with discharge because of their union activities.

WE WILL NOT threaten our employees with reprisals if they do not report the union activities of other employees.

WE WILL NOT discharge or otherwise discriminate against our employees because of their union activities.

WE WILL NOT refuse to hire, or refuse to consider for hire, employee-applicants because of their union activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of your rights as guaranteed by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's order, offer to Trevor Claffey full reinstatement, to the extent we have not already done so, to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL offer instatement to the appropriate discriminatees from the following list, as determined in the compliance stage of this proceeding should have been hired, to the available positions for which they applied, or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges: James Boehler, Stephen Catalina, James Caternolo, Steve Cirrincione, Lonnie Keys, Harry Moses, Robert Muller, John Perticone, Keith Warren, Richard Williams, and William Yatteau.

WE WILL make whole any of the discriminatees identified in the compliance stage of this proceeding as being entitled to reinstatement and/or instatement for any loss of earnings and other benefits resulting from the discrimination against them, less any net interim earnings, plus interest.

WE WILL notify in writing the Regional Director, the Charging Party, and any of the above discriminatees not offered instatement when openings arise, and consider them in a nondiscriminatory manner for these positions until such time as the Regional Director determines that the case should be closed.

WE WILL, within 14 days from the date of the Board's order, remove from our files any reference to the unlawful discharge of Trevor Claffey, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that his discharge will not be used against him in any way.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful refusal to hire or refusal to consider for hire James Boehler, Stephen Catalina, James Caternolo, Steve Cirrincione, Lonnie Keys, Harry Moses, Robert Muller, John Perticone, Keith Warren, Richard Williams, and William Yatteau, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the refusal to hire or consider for hire will not be used against them in any way.

CNP MECHANICAL, INC.

Aaron Sukert, Esq., for the General Counsel.

Anthony Adams, Esq. (Gates & Adams, P.C.), for the Respondent.

Michael Harren, Esq. (Chamberlain, Damanoa & Greenfield), for the Charging Party.

DECISION

STATEMENT OF THE CASE

Margaret M. Kern, Administrative Law Judge. This case was tried before me in Rochester New York on February 3, 4, and 5, 2003. The complaint, which issued on October 31, 2002,¹ was based upon unfair labor practice charges and amended charges filed on August 13, September 9, and October 29 by the U.A. Plumbers and Pipefitters Local Union #13 (union or Charging Party) against CNP Mechanical, Inc. (Respondent).²

It is alleged that in March and April, Respondent, by Lisa Legler, violated Section 8(a)(1) by advising an employee-applicant that Respondent's posted policy regarding job applications was a prerequisite to remaining a non-union shop, by informing an employee-applicant that he was not to talk to or accept literature from union representatives, and by interrogating an employee-applicant about his union activities and sympathies. It is further alleged that in May and June, Respondent, by Charles Natalello, violated Section 8(a)(1) by interrogating an employee, threatening employees with discharge and unspecified reprisals, and requesting that an employee report to him on the union activity engaged in by other employees. It is further alleged that between April 1 and April 18, Respondent violated Section 8(a)(1) and (3) of the Act by refusing to consider for employment, and by refusing to employ, employee-applicants James Boehler, Stephen Catalina, James Caternolo, Steve Cirrincione, Lonnie Keys, Harry Moses, Robert Muller, John Perticone, Keith Warren, Richard Williams, and William Yatteau. Finally, it is alleged Respondent violated Section 8(a)(1) and (3) on July 12 by terminating employees Steve Soper and Trevor Claffey.

FINDINGS OF FACT

I. JURISDICTION

Respondent admits, and I find, it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION STATUS

Respondent admits, and I find, the union is a labor organization within the meaning of Section 2(5) of the Act.

¹ All dates are in 2002 unless otherwise indicated.

² Counsel for Respondent in his brief, moved to correct blanks and errors in the transcript. That motion is unopposed and is granted. In his brief, counsel for Respondent also moved that GC Exh. 80 be stricken from the record or, in the alternative, that the hearing be reopened to permit Respondent to proffer testimony regarding the exhibit. The exhibit, obtained from Respondent by Counsel for the General Counsel by subpoena, was received without objection. The motion is therefore denied.

III. ALLEGED UNFAIR LABOR PRACTICES

A. Posted Application Policy

The union, through its business agent James Caternolo, has been attempting to organize Respondent's employees for a number of years and Respondent, through its owner and president Charles Natalello, has resisted these efforts. Natalello made clear in his testimony his dislike of Caternolo, ostensibly because of complaints Caternolo has made to governmental agencies and contractors alleging Respondent's failure to pay prevailing wage rates as required, and alleging that Respondent's work quality was substandard.

The union subscribes to the Dodge Report, a publication that lists construction jobs and those contractors who are successful in bidding for particular work. Beginning in about February, Caternolo learned from the Dodge Report that Respondent had been awarded at least three contracts. On March 13, Caternolo went to Respondent's facility accompanied by Gary Swanson, a representative of the Iron Workers Union. Each had the intention of applying for a job. When they arrived, they observed a sign on the window that stated: "Absolutely No Applications Accepted at CNP Mechanical, Inc. Without An Appointment! We Consider an Application Without an Appointment in Violation of the New York State Trespassing Laws."

Patrician Natalello, wife of Charles Natalello, testified about the sign that Caternolo and Swanson observed. She explained that prior to February 2000, Respondent's offices were in the Natalello home and the sign was posted on the door because she was often home alone. When Respondent's offices moved its facility, the sign was again posted. According to Mrs. Natalello, she didn't want people coming in because she and Legler were often alone in the office.

B. Applications for Employment

On March 19, Swanson telephoned Respondent's office and taped a conversation with Legler. Swanson testified he asked if he could make an appointment to submit an application for employment and Legler stated that they weren't taking any applications. She asked Swanson about his experience and he told her he had performed ironwork, plumbing, and carpentry. He then asked her about the sign on the window, commenting that he had never seen a sign like that before. Legler responded, "We're not a union shop." She referred to the sign as "a requisite to stay an open shop" and that union people didn't like them and tried a lot of things, but that Respondent had a good program and its employees were loyal. Swanson asked if he could bring in, mail, or fax a resume, and Legler said they were not allowed to accept them. Legler testified that in the course of her conversation with Swanson, he said he was employed by Mas-Ann, that he was a loyal and dependable employee, and not union. Legler acknowledged that she told Swanson the sign was related to Respondent remaining an open shop, but she denied she made this statement pursuant to any type of instruction from Natalello. Legler prepared a message slip regarding Swanson's call, which she later gave to Natalello. She noted on the slip that Swanson was looking for a job and she wrote that he was "loyal-dependable-not union!!" (Exclamation points in the original). On April 10, Swanson mailed his resume to Re-

spondent. On April 12, he received a letter from Natalello thanking him for his inquiry, but stating that “at present CNP is not hiring, interviewing or reviewing for employment.” The letter further stated that the company’s policy was to maintain resumes on file for 30 days after which an applicant could send another resume. Swanson did send a second resume.

On March 28, Caternolo telephoned Respondent’s office and taped a conversation with Legler. Caternolo identified himself as being from the union and said he would like to set up an appointment to put in an application for employment. He also said he had a lot of men interested in obtaining jobs. Legler told him, “We also have a lot of men.” Caternolo told Legler to have Natalello call him and she said she would. When Legler told Natalello about the conversation, Natalello told her that in the future she should tell callers the company was not hiring, but that applicants were welcome to send in their resumes. On about that same day, Caternolo received a call from Ray Natalello, the brother of Charles Natalello.³ Ray told Caternolo he was returning his call because his brother was busy. Caternolo asked Ray how he would go about applying for a job and Ray, in turn, asked Caternolo when was the last time Caternolo was “a hands-on plumber.” Caternolo responded it was about five years earlier and Ray questioned his enthusiasm for working as a plumber again. They spoke for a few more minutes and Ray told Caternolo to mail in a resume and they would consider it and keep it for 30 days. Caternolo mailed a resume to Respondent on April 1.

William Yatteau is employed as the apprentice coordinator for the union. On March 28, in Caternolo’s presence, Yatteau called Respondent’s office and spoke to Legler. He identified himself as a union applicant looking for a job. He told Legler he would like to set up an appointment for an interview and she said they currently were not hiring, but she would take his name and number, which she did.

Between April 1 and April 9, similar calls were placed to Respondent’s offices by James Boehler, Stephen Catalina, Steve Cirrincione, Lonnie Keys, Harry Moses, Robert Muller, and John Perticone. Each person inquired about employment, and each of them mentioned he was a member of the union.

The parties stipulated that Respondent received resumes for the following individuals in April and May: Boehler (mailed April 4), Catalina (mailed April 4), Caternolo (mailed April 2), Cirrincione (mailed May 1), Keys (mailed April 4), Moses (mailed April 9), Perticone (mailed April 4), Warren (mailed April 4), and Yatteau (mailed April 4).

On April 9, Caternolo called Respondent’s office, identified himself, and spoke with Legler. He asked her a question about the resumes and Legler responded, “Let me look, because I have two separate piles.” That same day, Natalello sent certified letters to Boehler, Catalina, Caternolo, Cirrincione, Keys, Moses, Perticone, Warren and Yatteau thanking them for their inquiries, but stating that “at present CNP is not hiring, inter-

viewing or reviewing for employment.” Natalello wrote that their resumes would be kept on file for 30 days. Identical letters were sent to Williams and Muller on April 25.

C. Legler’s Job Responsibilities

Legler testified she has been an administrative assistant for Respondent for three years. She described her job in the following terms: “I help to estimate jobs . . . I dictate or write letters that Chuck dictates. I answer the phone. I do paperwork, a lot of paperwork.” Legler has no responsibility regarding hiring or firing employees or evaluating job applicants. She denied dealing with timecards or the payroll. She testified that when she answers the phone, she writes the message in a phone log. She also places messages from the answering machine on the phone log. When she was hired, she was instructed to take phone messages and give them to Natalello.

Natalello testified that Legler’s title is assistant to the project managers and her responsibilities are mostly secretarial. She answers the office phone and sorts quotes from vendors. She does not have authority to hire, fire, or discipline employees. When she was hired, his only instruction to her regarding answering the phone was to give him a thorough message.

James Montinarelli testified on direct examination that “as I became superintendent I had noticed that Lisa was responsible for purchasing materials for the job, payroll, and estimating . . . She would estimate the cost that a project would take to perform.” In addition, she answered the phone. On cross-examination, however, Montinarelli testified that after he began working for Respondent, he never went to the office so he never saw Legler actually performing estimating work or payroll. He only knew that she answered the office phone.

Louis Erbach was employed by Respondent from September 1998 to July 2001. He testified when he needed to contact Natalello, Legler would locate him. He also testified he turned his employees’ timecards into Legler.

Patricia Natalello testified that she, not Legler, does the payroll, bookkeeping, and financial reports for the company. She testified it is Legler’s responsibility to type letters, answer the phone, take messages, and maintain the books for the jobs the company performs.

D. Legler’s Handling of Phone Inquiries

Legler testified that prior to February, she rarely received phone calls from job applicants, but that beginning in February, she began receiving a number of these types of calls. In late February or March (or as she later testified, in late March or early April), Natalello told her to respond to these calls by saying that the company was not hiring and that the applicant should send a resume.

Natalello testified that in about the end of March, Legler told him she was getting phone calls from persons inquiring if the company were hiring. Natalello told Legler, “let them know that we’re not hiring, we’ve got no more positions open.” Natalello testified, “We were getting bombarded with phone calls, completely and totally uncommon to our business. It’s never happened before. Number one, our work force was completely filled, we didn’t need anybody else. I believe I may have consulted my attorney on this, at that point.”

³ At the hearing, counsel for the General Counsel moved to amend the complaint to allege Ray Natalello as an agent of Respondent within the meaning of Sec. 2(13) of the Act. The amendment was allowed over Respondent’s objection. To avoid confusion, I will refer to Ray Natalello as Ray.

Natalello met with his attorney and told him how he had conducted hiring in the past. Counsel asked Natalello what he normally did with resumes when he was not hiring, and Natalello said he typically did not receive resumes. Counsel then asked how he handled applications when he was not hiring, and Natalello said he kept them for future consideration. After meeting with his attorney, Natalello instructed Legler if she received calls from individuals seeking employment she was to tell them they were not hiring anymore but that they could send in their resumes.

E. Respondent Hires Soper

1. Soper's version

Soper is a plumber with 18 years experience. He testified that in mid-February, and again in late March or early April, he called Respondent's office and left messages that he knew Andy McDermott, a superintendent for Respondent, and that he was interested in working for Respondent. In about early April he received a phone call from Natalello who said he had gotten Soper's messages and that McDermott had good things to say about him. Natalello said he would be in touch. Soper asked if they could meet, and Natalello agreed to meet on April 6. At this meeting, Natalello told Soper that he had a job if he wanted one. He said it might be a week or it might be a month, but that he had a lot of work and was just waiting for the jobs to begin.

A few weeks after the April 6 meeting, Natalello called him and said he wanted to meet with him on April 25. He met on that day with Natalello and James Montinarelli, another job applicant. In Soper's presence, Natalello told Montinarelli he would start work on Monday, April 29 at the Irondequoit School, and he told Soper he would begin work on April 30 at the Leroy Central School. Soper was given paperwork to fill out and sign. For "date of contact" Soper wrote "2-12-02" and for "date of hire" he wrote "3-11-02." As to why he entered these dates, Soper testified, "Because Mr. Natalello told me to."

Soper's last day of employment with Mas-Ann was April 26, and his first day of employment with Respondent was April 30.

2. Respondent's version

Paul Battaglia was employed by Respondent as a plumber for a year and a half. He testified that in February he received a call from Soper, whom he knew from working together at Mas-Ann. Soper said things weren't going well at Mas-Ann and he was looking for work. Battaglia gave Soper Natalello's number and told him he should call because Natalello was hiring.

Natalello testified that beginning in February, he decided he would have to hire additional employees. He was receiving phone calls from individuals looking for work, and he was hearing from his own employees of people they knew who were looking for work. Soper was recommended by McDermott and Battaglia and he called Soper and met with him in his office at the end of February. He told Soper about the company, "what I had to offer, and the jobs I had just recently won . . . I asked him if he wants to come aboard, we would be prepared to take him aboard." Soper responded that he had to talk to his wife about it and that he would call him back. In the first week of March, Soper called Natalello and said he had made the decision "to come aboard." Natalello said they would get to-

gether at a later time, and they met about a week later again at the office. Natalello told Soper he had the job and that he would start "as soon as work broke." Soper said it was not a problem because he was still working for Mas-Ann. Natalello gave Soper an employment package with forms to fill out, and Soper took the package, shook hands with Natalello, and left. He did not fill out the paperwork at that time.

Natalello testified that at the end of April he called Soper to come into the office with Montinarelli to complete the employment package paperwork because work was going to start the following week. When Soper asked him what date to put down for the date of hire, Natalello told him to write the first week in March.

Battaglia testified that in early March, Soper left a message for him stating that he had made contact with Natalello and that he had a job. On about March 18, when Battaglia returned from vacation, he called Soper and Soper thanked him for getting him a job with Respondent. Soper said that Natalello had hired him and that he would be starting, "when the weather broke."

Natalello denied meeting with Soper on April 6. He testified he could not have met with Soper that day because he was in North Carolina performing a job.

Respondent's payroll records show April 30 as Soper's date of hire.

F. Respondent Hires Claffey

1. Claffey's version

Claffey, a plumber with 15 years experience, also worked for Mas-Ann. He testified that in late March, he called Respondent's office to inquire about employment and spoke to Natalello. They arranged to meet on April 1. At that meeting, Natalello told Claffey he had work coming up but that due to rain, it might be two or three weeks away. Natalello expressed an interest in hiring Claffey, and Claffey expressed his interest in being employed.

On May 4, Claffey and Natalello met again and Claffey filled out employment forms. Under "date of contact" Claffey wrote "1. 3-1-02 talked to Chuck. 2. 3-7-02 to report on future date." For "date of hire" Claffey wrote "3-13-02." Claffey then signed the form and dated it May 4. Claffey testified he listed March 13 as his hire date because he "was asked to write it by Mr. Natalello." At the conclusion of the meeting, Natalello told Claffey he would call him in a few days to begin work.

Claffey began working for Respondent on about May 6.

2. Respondent's version

Natalello testified he first met Claffey, who had been recommended by Soper and Battaglia, at the end of February, in the parking lot of his office. He told Claffey he had great recommendations, but that he was told Claffey had an attendance problem. Claffey said that was caused by the fact that his wife had gotten a job, but that it would not be a problem. Claffey called a few times, and they next met at the beginning of March again at the office. Natalello gave him employment forms to fill out and told him he had a job. Claffey asked when he could start and Natalello told him all the jobs were on hold because of wet weather. Natalello told him he expected the jobs to begin in April. In about the end of March, Natalello received a call from

Claffey stating he was filling out the forms and Claffey asked him when he was coming to work and what dates should he put on the form. Natalello told him to write March 13.

G. Respondent Hires Montinarelli

1. Montinarelli's version

Montinarelli is a plumber with 13 years experience and in the six years prior to the events of this case, he worked for Mas-Ann as a plumber and job foreman. He testified that in early February, he called Andy McDermott, a superintendent for Respondent with whom he had previously worked at Mas-Ann. Montinarelli told McDermott Mas-Ann was having financial difficulties and he was not certain the company would continue operating. He said he was interested in obtaining employment with Respondent. About two weeks after his conversation, Montinarelli called Respondent's office and left a message on the answering machine stating he was interested in working for Respondent.

Montinarelli testified that in early April, he received a call from Natalello who asked if he were still interested in working for Respondent and Montinarelli said yes. Natalello said, "Okay, I do not have anything right now, but I will get back to you." On April 22, Montinarelli went to Respondent's office and spoke with Legler. He told her he had had spoken to Natalello earlier in the month. Legler asked him whom he worked for, and he told her Mas-Ann. She asked if he were affiliated with the union and he said he was not. She asked him how he felt about the union and he said he had no feelings about it either way. Legler responded, "Well, good, we have our hands full here with the union." She then told him the company policy was that if a union representative comes onto a job site, employees should walk away from them. If they hand out literature, employees should hand it back. If they throw the literature on the ground, employees should pick it up and give it back.

Montinarelli testified that on April 25 he received a phone call from Natalello telling him to come to the office the next day after work. Natalello said that as Montinarelli and Soper were both working for Mass-Ann, Montinarelli should bring Soper along.

On April 26, Montinarelli, Soper, and Natalello met in Respondent's office. Natalello told them about the projects where they would be employed and he gave them paperwork to fill out and sign. Montinarelli testified he filled out the cover page entitled "employee information", signed it, and dated it April 26, 2002. Under "date of contract" he entered the date "2/11/02" and under "date of hire" he wrote "March 18, 2002." He testified he had been "instructed" by Natalello to enter these dates: "As I was filling out the form he just said to pick a date in February for contact and pick any date in March for date of hire." Since Montinarelli did not have a calendar in front of him, he jokingly asked Natalello, "Well, what if that date is a Sunday, should we say we met in church?" According to Montinarelli, Natalello also told Soper to pick a date in February for contact and a date in March for hire. He began working for Respondent on April 29.

2. Respondent's version

McDermott testified that on about February 13, Legler told him that Montinarelli had called the office looking for work and she asked him to find out what Montinarelli was up to. He called Montinarelli and told him Respondent was a decent company to work for. Over the following three or four weeks, Montinarelli called him on two or three occasions asking if he were going to be hired.

Natalello testified that Montinarelli called him in mid-February about a job. Natalello spoke to McDermott and Battaglia and they both gave Montinarelli very good recommendations. According to Natalello and Legler, Natalello met with Montinarelli in his office at the end of February. Natalello testified he told Montinarelli that he was interested in him and "he certainly could come aboard with us." Montinarelli told him that he could not leave Mas-Ann right away because he was running a job for them, but they agreed to keep in touch. Natalello gave Montinarelli employment forms to take with him and told him to complete the forms and return them before he started working for Respondent.

Natalello testified he and Montinarelli met again in the office in mid-March. Montinarelli asked when he would be starting work and Natalello said he did not know because he had just returned from being out of town and he would have to visit the jobsites. He told Montinarelli to give notice to Mas-Ann because he would be start working for Respondent by the end of March. Montinarelli asked Natalello what date to fill in as his hire date on the employment forms, and Natalello told him to write in the middle of March.

At the end of April, Natalello called Montinarelli and told him that he and Soper should come to the office, drop off their employment forms, and that they would begin work the following week.

Legler testified in about mid-March, Natalello called her he would be late for a meeting with Montinarelli at the office. He asked Legler to stay in the office until Montinarelli arrived. When Montinarelli arrived, Legler asked him where he was currently working and, according to Legler, Montinarelli told her he was employed on the jail job. She asked how it was going and he said it was not going very well because the union was "messing with them." Legler denied asking Montinarelli any questions about his union sympathies. Nor did she tell him of any company policies concerning unions.

Legler testified she spoke with Montinarelli by phone on March 26 and prepared a phone message. The message stated that Montinarelli had called and that he told Mas-Ann that he was leaving on the 15th.

Respondent's payroll records reflect Montinarelli's hire date as April 29. He never provided Respondent with a resume.

H. Respondent's Payroll Records

Patricia Natalello testified Respondent utilizes a company called Paychex to do payroll. She notifies Paychex of new hires only after they have begun working, when she calls in their hours. Paychex then assigns the employee a number, and determines the appropriate deductions. Natalello denied providing Paychex with the specific dates of hire for Montinarelli, Claffey, or Soper, and testified she did not know from where

Paychex obtained that information, or how they determine employee payroll numbers.

I. Respondent's Hiring Pattern

Natalello testified that after his meeting with Montinarelli in March, he "was done" hiring at that time. Prior to March, he had received calls from other Mas-Ann employees, but he denied having received any calls for employment from individuals who identified themselves as from the union. At the end of March, Legler told him she was still getting calls from people looking for work and he told her to tell the people that they were not hiring and no positions were open. Even after Montinarelli, Soper, and Claffey left his employ he did not hire anybody to replace them because, as he explained, the jobs were "just starting to wind down."

J. Events of May 1 and 2

Soper testified that on May 1, his second day of employment with Respondent, Caternolo came onto the Leroy jobsite where he was working and spoke to him. The next day, Natalello came to the site and told Soper he understood a union representative had been on the site talking to him. Soper said yes, and Natalello said, "Well, the union is not our friend. CNP is one big happy family. I can obviously not tell you who you can talk to. But if you continue talking to a union representative then we will have to reevaluate your position in this company." Soper testified that shortly after this conversation, he heard Natalello tell the construction manager on the site that the union was not allowed to talk to any of his employees and that union representatives were to be escorted off the site.

According to Natalello, when he went to the jobsite it was Soper who told him that Caternolo had been there. Natalello asked Soper if he had reported Caternolo's presence to the job superintendent and Soper said he had not. Natalello testified, "That's when I advised him of the policies on the job site, that all visitors are to be signed in or acknowledged." Natalello denied threatening Soper for talking to Caternolo.

Natalello testified that at a meeting of his employees, Robert Coffta, one of his superintendents, asked him what they were to do if they were approached by a union representative on the job. According to Natalello, he told the assembled employees that union representatives had the right to speak to them as long as they were not interfering with their work. Natalello could not recall the date of this meeting.

K. Events of June 10

Montinarelli testified that on June 10, Natalello came to the Irondequoit site where he was working and they spoke in the job trailer. Natalello told him, "I just want to let you know at this time there will be union personnel entering the job site. Because now that there is a union contractor performing work on the site they are allowed on the job. And I want to tell you that I want to know if yourself or any other employee talks to the union representative. I want to know when, where and how long. If you don't tell me, someone else will. Then I will know which side of the fence you are really on."

Natalello testified that on an occasion in April or May, Montinarelli told him that Caternolo had visited the Irondequoit site. Natalello asked him if he had Caternolo sign in when he -

arrived, and he told Montinarelli it was important that all visitors sign in and report to the office. According to Natalello, Montinarelli asked if he, Montinarelli, could speak to Caternolo and Natalello told him, "I don't care what you do, as long as you do it on your own time."

L. Events of July 11 and 12

Caternolo told Montinarelli, Soper, and Claffey on July 11 that he had jobs for them with union contractors and that they would become members of the union. He told Claffey he wanted him to go to the Irondequoit site the following morning and begin an organization drive among Respondent's employees by distributing literature and union shirts to employees before working hours. He told Montinarelli that he should call Natalello and tell him that Claffey was distributing union literature. He told Soper he should report for work the following day and then quit his employment. He told Soper, however, he should complete the workday.

At about 6:20 a.m. on July 12, Caternolo met with Claffey and Montinarelli at Claffey's house and he gave Claffey union shirts, buttons, and stickers to distribute. Claffey lived about one to two miles from the job site. Caternolo told Montinarelli to go to the job site with Claffey to witness him distributing the materials and that he should follow Natalello's earlier instruction to notify Natalello of any union activity on the site. Montinarelli and Claffey left Claffey's house at about 6:30 a.m. and traveled to the Irondequoit site. They arrived at about 6:40 a.m. Two of Respondent's employees were there at the time and Claffey gave them pamphlets and stickers. One of the employees commented that Natalello would be angry. At about 6:55 a.m., the employees went to their workstations and began working.

According to Montinarelli, at about 7:30 a.m., he called Natalello and told him Claffey had come to work wearing a union shirt and that he had distributed union information to workers before work began. Natalello said he could not believe it and told Montinarelli to tell Claffey to return his tools and to report to the office. Montinarelli immediately conveyed the message to Claffey and Claffey cleaned up his work place, returned his tools, and left the site at about 8:00 a.m.

Legler identified a message dated July 12 at 7:08 a.m. from Montinarelli to Natalello. The message was that Claffey was not at his workstation and that Natalello should call him as soon as possible. Natalello testified that at about 7:20 a.m. he received a call from Montinarelli, who told him Claffey was handling out union literature. Natalello asked if Montinarelli had given Claffey permission to distribute the literature and Montinarelli said no. Montinarelli also said that Claffey was not at his workstation. Natalello told Montinarelli to tell Claffey to grab his tools and "get his butt to the office, I'll see him at 8:00 a.m."

Natalello testified he wanted Claffey to come to the office that morning because he was going to transfer him to a different work site with a different supervisor. He explained that Claffey had a history of tardiness and absenteeism with a previous employer, and that on May 28 and June 6, Natalello had put letters in Claffey's file regarding his failure to report to work on time. Natalello testified he had also spoken to Claffey about these

infractions. Natalello felt Claffey was a good worker, but he knew Claffey and Montinarelli were friends and he thought it was possible that Montinarelli was not properly supervising Claffey.

Montinarelli testified Respondent's office is 40 miles, or a 45-minute drive, from the Irondequoit site. Natalello testified it is only a 30-minute drive.

Claffey testified that when he left the Irondequoit site that morning, he stopped at home to get some money and then he stopped for gas. He was also delayed by road construction, and he did not arrive at Respondent's office until sometime between 9:00 a.m. and 9:15 a.m. As he pulled in to the parking lot, Natalello was in his car preparing to leave. Natalello returned to the lot, got out of his truck and told Claffey he had broken company policy. When Claffey asked what he was talking about, Natalello said he had a meeting to go to and he was already late because he had been waiting for Claffey. Claffey said he was sorry and asked what was going on. Natalello told him, "I do not want to see you on any of my job sites. If you want to talk to me, you are going to have to call to make an appointment with me." Claffey said, "I am going on an unfair labor practice strike" and Natalello drove away. The unfair labor practice that he was referring to was his belief that he had been fired for distributing union literature on the job.

Natalello testified that Claffey pulled into the parking lot at 9:15 a.m., jumped out of his truck, and said, "Chuck, this isn't personal." Natalello asked him what he was talking about, and he said he was going on a ULP strike. Natalello again asked him what he was talking about and said he did not know what a ULP strike was. Claffey got into his truck to leave and Natalello told him he should not return to work until meeting with him on Monday morning, and that he should call Legler to make an appointment to speak to him. According to Natalello, Claffey left and he went to his appointment.

Legler testified that sometime after 9:00 a.m., she saw Claffey drive very quickly into the parking lot. Natalello got out of his truck and she saw the two men speaking but she could not hear what was being said other than a reference by Claffey to "some letters." She also heard Natalello say he "didn't understand." She saw Claffey storm away in his truck. Natalello shrugged his shoulders and drove away.

Montinarelli testified that later that morning, Natalello called him and asked if Claffey had returned to the Irondequoit site. Montinarelli said he had not. Natalello told him if Claffey showed up at the site, he was to be told that he was not allowed to be there and that he would be removed by the police. According to Natalello, at about 10:20 a.m., he received a call on his cell phone from Montinarelli who asked what had happened with Claffey. Natalello responded nothing. Montinarelli asked then why was Claffey not at the job site and Natalello said he did not have time to meet with Claffey, as he had wanted. Montinarelli said that was "bull." Natalello said he wanted to talk to Claffey before he went to any other job site. Montinarelli said that it was not fair, that it was wrong, and that he was on a ULP strike too.

At 11:30 a.m., Caternolo arrived at the Irondequoit site and told Montinarelli to call Natalello and tell him that he, Montinarelli, was going out on an unfair labor practice strike. At

about noontime, Montinarelli placed the call. He asked Natalello why Claffey was not returning to the job and Natalello asked Montinarelli if he were representing Claffey. Montinarelli said he did not represent Claffey but that Claffey was a good friend of his and he didn't understand what was going on. Montinarelli said of Claffey, "He didn't break any rules or any laws. I need him here." Natalello said if he needed people at the job he would get him people. Montinarelli said, "I do not feel what you are doing is fair. I am leaving this job on an unfair labor practice strike."

Soper testified that he reported for work at 7:00 a.m., his regular time. He testified he told Robert Coffta, the job superintendent, that he was quitting to go work for the union and that would be his last day. Coffta said he would have to call Natalello because he normally did not allow employees to work for the day. Soper said he would be at his workstation if Coffta wanted to speak with him. About 10 minutes later, Coffta approached Soper and made a gesture of his thumbs out and over his shoulders, like a baseball umpires' sign for out. He said he had just gotten off the phone with Natalello and that Natalello wanted Soper to leave. Soper picked up his tools, shook Coffta's hand, and left the site.

Coffta testified that Soper came into his office at 7:00 a.m. and told him "that he was quitting, and was going to seek employment elsewhere." Coffta said he was sorry to lose him because he was a good employee. Soper then asked, "Should I stay or go home?" Coffta said he didn't know and that he would call Natalello, but in the meanwhile, Soper should pick up his tools. Coffta called Natalello and told him what Soper had said, making no mention of the union because Soper had not mentioned the union to him. Natalello asked if Coffta had a job that Soper could start and finish that day, and Coffta said he did not as Soper had finished up a job the day before. Natalello said that in that case, Coffta should let Soper go home. After Soper got his personal belongings and was leaving, Coffta asked him what he was going to do, and Soper said, "I have 11 years left, I'm probably going to join the union." Coffta wished him good luck, and he left. According to Coffta, that was the first time Soper mentioned the Union to him.

Legler identified a telephone message from Coffta for Natalello that she took at 7:00 a.m. on July 12. The message read, "Needs to talk to you. Steve Soper is quitting. Please call ASAP." Legler called Natalello and gave him the message.

Natalello testified he received a call from Coffta who told him Soper had just quit. He asked Coffta when Soper was leaving and Coffta said Soper wanted to leave that day. Natalello asked if Coffta had a job that Soper could start and finish that day, and Coffta said he did not, and that Soper had finished a job the day before. Natalello told Coffta, "then let him go."

Natalello testified that in the past when employees told him they were quitting, his reaction has depended on the nature of the job the employee was working on and the amount of work. One named employee told him he was leaving to go with the union. He was the only employee working at a job with a superintendent and "they were bombed with work." Natalello asked him how long he could stay, and he said he could stay two weeks. Natalello only needed him for one week, and the employee left a week later.

M. Exchange of Letters

By letter dated July 13, Caternolo advised Natalello that Claffey, Montinarelli, and Soper were unfair labor practice strikers as of July 12, and that charges were filed with the Board in that regard. On July 16, counsel for Respondent wrote to Caternolo stating that Caternolo's letter was the first Respondent knew that Soper was on strike. Counsel wrote, "[Soper] had simply advised the company that he was quitting." The letter further stated that although Montinarelli and Claffey did tell Natalello that they were going on a ULP strike, they did not state what ULP they were striking about. He continued, "Nevertheless, CNP offers to reinstate all three gentlemen to their former positions immediately if they choose to return to work."

Caternolo responded, in relevant part:

We feel that the workers will be subjected to more illegal activity within the company, and that it will be a corrosive environment to try and form a union at this time.

Should CNP Mechanical be willing to discontinue any and all unfair labor practices being committed such as interrogation, intimidation, among other unlawful acts, the above referenced offers will be considered.

IV. ANALYSIS

A. Legler's statements

It is alleged Respondent violated Section 8(a)(1) of the Act by the statements made by Legler to Swanson on March 19, and to Montinarelli on April 22. The initial inquiry is whether Legler is an agent of Respondent within the meaning of Section 2(13) of the Act. An employer may properly be held responsible for the conduct of an employee as an agent where, under all the circumstances, employees would reasonably believe that the employee was reflecting company policy and acting on its behalf. *Kosher Plaza Supermarket*, 313 NLRB 74 (1993). The party alleging agency status bears the burden of proof on the issue, in this case, counsel for the General Counsel.

The evidence establishes that Legler was often the only individual in Respondent's office and she was the person designated by Respondent to respond to all initial inquiries from individuals seeking employment. The Board has found employees in similar circumstances to be agents of their employers. In *GM Electrics*, 323 NLRB 125, 126 (1997), a secretary was found to be an employer's agent when she was often the only person in the office, distributed and collected job applications, and discussed hiring needs with applicants. Citing *Southern Bag Corp.*, 315 NLRB 725 (1994), the Board reasoned that applicants "would reasonably believe that [she] could speak and act on matters concerning Respondent's handling of job application procedures and that her statements about Respondent's handling of job applications would likely reflect company policy." Similarly, in *Diehl Equipment Co.*, 297 NLRB 504, fn.2 (1989), the Board found agency status where the bookkeeper/secretary's job "routinely involved handing job applications to individuals and receiving the completed applications from them. Consequently, Respondent placed [her] in a

position in which she had the apparent authority to provide information and to answer questions."

Based on the foregoing principles, I find Counsel for the General Counsel has sustained his burden of establishing that Legler was an agent of Respondent within the meaning of Section 2(13) of the Act. On March 19, when Swanson asked Legler about the sign on the window, she told him that they weren't a union shop and the sign was "a requisite to stay an open shop." This statement had a reasonable tendency to coerce employees in the exercise of their Section 7 rights. *GM Electrics*, supra, *KSM Industries, Inc.*, 336 NLRB 133 (2001). An employee hearing this statement could reasonably assume that working for Respondent and joining a union were not compatible. Legler's statement therefore violated Section 8(a)(1) of the Act.

With respect to Legler's statements on April 22, Montinarelli testified that Legler asked him if he was affiliated with the union and, when he said that he was not, she asked him how he felt about the union. She also told him that the company policy was that if union representatives came on the job site, he should walk away from them. She said if they handed him literature he should hand it back, and if they threw literature on the ground, he should pick it up and give it back to them. Legler denied making any such statements. According to Legler, she asked Montinarelli, "How's it going?" and he volunteered that it wasn't going well because the union was "messing with them [at Mas-Ann]."

I found Montinarelli to be an entirely credible witness. His demeanor was straightforward and he was equally responsive on both direct and cross examination. In addition, I find it highly unlikely that Montinarelli would volunteer this statement to Legler, especially since there is no evidence that Mas-Ann was having labor difficulties. In contrast, Legler was not believable. She often admitted to making statements only after being confronted with recordings and transcripts of previous statements. She was overly-careful on cross examination and gave the impression of being more concerned about making a mistake than giving an honest recitation of events. I therefore credit Montinarelli's version of this conversation and find Legler's statements violated Section 8(a)(1) of the Act.

B. Natalello's Statements

It is alleged that Respondent, by Natalello, on about May 2, violated Section 8(a)(1) of the Act by threatening Soper with discharge if he spoke to a union representative. Soper testified that the day after Caternolo visited his jobsite, Natalello came to the site and told Soper he understood that a union representative had been at the site. Soper said yes. Natalello then told him the union was not their friend and that although he could not tell Soper whom he could talk to, if Soper continued to speak to the union people, Natalello would have to reevaluate Soper's position in the company. Natalello denied making any such statements. Rather, Natalello testified that he asked Soper if he had reported Caternolo's presence to the job superintendent, and when Soper said he had not, Natalello told him that all visitors had to sign in.

I credit Soper's testimony as clearly more credible than Natalello's. Soper had been working for Respondent only a few

days before this incident and I find it highly unlikely that he would voluntarily tell Natalello about Caternolo's presence on the jobsite the day before, especially considering the amount of time he spent seeking employment with Respondent. Further, I found Natalello to be a generally incredible witness. He is possessed of an undisguised dislike for the union and for what he perceives as Caternolo's interference with his attempts to obtain jobs. His bias was manifestly obvious during his testimony. I therefore credit Soper's testimony over that of Natalello, and I find Natalello's statements to Soper about Caternolo's presence at the job site, and his clear threat that Soper's job would be in danger if he continued to speak to union representatives, violated Section 8(a)(1) of the Act.

The complaint further alleges a similar violation by Natalello, but this time involving Montinarelli on June 10. Montinarelli testified that on that day, Natalello came to the job site and told him that since there was a union contractor on the site, union representatives were permitted on the site. Natalello told Montinarelli he wanted to know if he or any other employee was speaking to union representatives. According to Montinarelli, Natalello added, "If you don't tell me, someone else will. Then I will know which side of the fence you are really on." Natalello's version of this conversation was that when Montinarelli told him that Caternolo had been at the job site, Natalello told him that it was important that all visitors sign in. When Montinarelli asked if he could speak to Caternolo, he replied that he didn't care what he did, as long as he did it on his own time. For the same reasons as stated above, I found Montinarelli credible and Natalello not credible. I find Natalello's statements violated Section 8(a)(1) of the Act.

C. Soper and Claffey

In *Wright Line*, 251 NLRB 1083, 1089 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the Board established an analytical framework for deciding cases turning on employer motivation. The General Counsel must first persuade, by a preponderance of the evidence, that an employee's protected conduct was a motivating factor in the employer's decision. If the General Counsel is able to make such a showing, the burden of persuasion shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. The elements commonly required to support a finding of discriminatory motivation under Section 8(a)(3) are union activity, employer knowledge, and employer animus. *Sears, Roebuck & Co.*, 337 NLRB No. 65 (2002) and cases cited.

It is not disputed that when Soper reported for work on the morning of July 12, he told Coffta he was quitting his employment with Respondent but was willing to work for the balance of the day. There is a dispute as to whether, in that initial conversation, Soper told Coffta he was quitting to go work for the union. Regardless of whether Soper mentioned the union at that point, Coffta's credible and uncontradicted testimony was that there was no work assignment that Soper could start and finish in one day, and it was for that reason that Soper was sent home. I further note that Coffta and Soper had a very good working relationship and that Coffta told Soper he was sorry to lose him as an employee. Even if Soper mentioned that he was quitting

to go work for the union, there is no evidence that Coffta repeated that statement to Natalello. It was Natalello's decision to send Soper home because there was no assignment that Soper could complete in one day. Respondent did not terminate Soper, he quit. I therefore recommend this complaint allegation be dismissed.

Claffey's termination is a different story. The credible evidence establishes that when Natalello received the call from Montinarelli at 7:08 a.m. telling him that Claffey had been distributing union literature prior to the start of work, Natalello told Montinarelli that he could not believe it, and that Montinarelli should tell Claffey to return his tools and report to the office. When Claffey spoke with Natalello later that morning, Natalello told him he did not want to see him on any of his jobsites. Natalello also later instructed Montinarelli that if Claffey came back to work, he was to be told that he was not allowed on the jobsite and that he would be removed by the police if necessary. At no time did Natalello tell Claffey or Montinarelli that it was his intent to transfer Claffey to another jobsite. Thus, Natalello's testimony that this was his intent is not credible.

The only conclusion reasonably to be drawn from Natalello's statements on July 12 is that Claffey was terminated, and I so find. I therefore find Counsel for the General Counsel has sustained his initial burden that Claffey's union activities on the morning of July 12 were a motivating factor in his termination. As Claffey had worked for Respondent for over two months, without incident, I find that Respondent has not sustained its burden that he would have been terminated absent his union activity.

D. Refusal to Consider and Refusal to Hire

The final allegation is that Respondent violated Section 8(a)(1) and (3) of the Act by refusing to consider for employment, and by refusing to employ, Boehler, Catalina, Caternolo, Cirrincione, Keys, Moses, Muller, Perticone, Warren, Williams and Yatteau.

In *FES*, 331 NLRB 9, 12 (2000), the Board stated:

To establish a discriminatory refusal to hire, the General Counsel must . . . [under the *Wright Line* burdens] first show the following at the hearing on the merits: (1) that Respondent was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct; (2) that the applicants had experience or training relevant to the announced or generally known requirements of the position for hire, or in the alternative, that the employer had not adhered uniformly to such requirements, or that the requirements were themselves pretextual or were applied as a pretext for discrimination; and (3) that antiunion animus contributed to the decision not to hire the applicants. Once this is established, the burden will shift to Respondent to show that it would not have hired the applicants even in the absence of their union activity or affiliation.

In *FES*, at 15, the Board further set forth the principals involving an alleged refusal to consider violation:

The General Counsel bears the burden of showing the following at the hearing on the merits: (1) that Respondent excluded

applicants from a hiring process; and (2) that antiunion animus contributed to the decision not to consider the applicants for employment. Once this is established, the burden will shift to Respondent to show that it would not have considered the applicants even in the absence of their union activity or affiliation.

Swanson called Respondent's office covertly on March 19, and asked if he could make an appointment to submit an application or if he could send in a resume. Legler told him that they weren't accepting applications or resumes. The message that Legler gave Natalello for this call referred to Swanson as loyal, dependable, and nonunion. He mailed his resume on April 10; two days later he received a response from Respondent saying that they weren't hiring or interviewing. On about March 28, Caternolo and Yatteau called Respondent's office where they spoke to Legler. They each identified themselves as being with the union and asked to put in an application for employment or set up an appointment. She took their names and telephone numbers. Later that day Caternolo received a call from Ray, who asked Caternolo when was the last time he was "a hands on plumber." Caternolo responded that it was five years earlier, and Ray questioned whether he was really interested in plumbing work, but told him to mail in a resume, which he did. Between April 1 and April 9, seven other union members called Respondent in Caternolo's presence, identified themselves as union members and inquired about employment. Eight of them mailed a resume to Respondent between April 2 and April 9, and one mailed his resume on May 1.

There are some major credibility issues as to whether Respondent was hiring employees, or had concrete plans to hire employees, at the time that the union salts called to apply for work. At one end of the spectrum, Respondent alleges that it committed to hire Soper, Claffey and Montinarelli in late February or early March and had no further hiring needs. However, because of the wet weather, they did not begin working until April 29, 30 and May 6. Counsel for the General Counsel alleges that they were not offered jobs until April. Without much difficulty I credit the testimony of Soper, Claffey and Montinarelli over that of Natalello, whom I found generally to be lacking in credibility. I find that Soper was hired on April 6, when Natalello told him that he had a job if he wanted one. Claffey was hired on April 1, when Natalello told him that he had work coming up and that he was interested in hiring Claffey if Claffey was interested in working for him. I further find that Montinarelli was hired in early April when Natalello asked him if he was still interested in working for him. When he said that he was, Natalello said, "Okay. I don't have anything for you right now, but I will get back to you." Although Soper, Claffey and Montinarelli did not begin work until the end of April or the beginning of May, that was a result of the rainy weather, something Natalello could not control.

Based upon the above, I find that Respondent was hiring, or had concrete plans to hire, at the time Swanson, Caternolo and the union salts applied to work for Respondent. The evidence establishes that Respondent refused to consider these individu-

als for employment, and refused to hire them, in violation of Section 8(a)(1) and (3) of the Act.⁴

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent, by Lisa Legler, violated Section 8(a)(1) of the Act on March 19, 2002, by telling an employee-applicant that Respondent's posted policy restricting job applicants from entering Respondent's premises was a prerequisite to maintaining a nonunion shop;

4. Respondent, by Lisa Legler, violated Section 8(a)(1) of the Act on April 22, 2002, by interrogating an employee-applicant about his union activities and sympathies, and by informing the employee-applicant that he was not to talk to, or accept literature from, union representatives.

5. Respondent, by Charles Natalello, violated Section 8(a)(1) of the Act on May 2, 2002, by threatening an employee with discharge if the employee spoke to union representatives.

6. Respondent, by Charles Natalello, violated Section 8(a)(1) of the Act on June 10, 2002, by threatening an employee with reprisals if he did not report on the union activities of other employees.

7. Respondent violated Section 8(a)(1) and (3) of the Act on July 12, 2002 by terminating discharging Trevor Claffey because of his union activities.

8. Since on or about April 1, 2002, Respondent has violated Section 8(a)(1) and (3) of the Act by refusing to hire, and refusing to consider for hire, James Boehler, Stephen Catalina, James Caternolo, Steve Cirrincione, Lonnie Keys, Harry Moses, Robert Muller, John Perticone, Keith Warren, Richard Williams, and William Yatteau.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent discriminatorily discharged employee Trevor Claffey, it must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F.W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Having found that Respondent discriminatorily refused to hire or consider for hire James Boehler, Stephen Catalina, James Caternolo, Steve Cirrincione, Lonnie Keys, Harry Moses, Robert Muller, John Perticone, Keith Warren, Richard Williams, and William Yatteau, it must offer them reinstatement to the positions for which they applied or, if those positions no longer exist, to substantially equivalent positions, without

⁴ I have not discussed the applicants' qualifications. Natalello did not question them, nor does Respondent's raise this issue in its brief. *Jacobs Heating & Air Conditioning*, 341 NLRB 981 (2004).

prejudice to their seniority or any other rights or privileges. Respondent must further make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date they would have been hired less any net interim earnings, as prescribed in *F.W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact, conclusions of law and on the entire record, I issue the following recommended⁵

ORDER

The Respondent CNP Mechanical, Inc., Hilton, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Telling employees or employee-applicants that its posted policy restricting job applicants from entering its premises is a prerequisite to maintaining a nonunion shop;

(b) Interrogating employees or employee-applicants about their union activities;

(c) Telling employees or employee-applicants that they should not talk to, or accept literature from, union representatives;

(d) Threatening employees with discharge for engaging in union activities.

(e) Threatening employees with reprisals if they do not report the union activities of other employees;

(f) Discharging or otherwise discriminating against employees for supporting U.A. Plumbers and Pipefitters Local Union # 13, or any other union;

(g) Refusing to hire, or consider for hire, James Boehler, Stephen Catalina, James Caternolo, Steve Cirrincione, Lonnie Keys, Harry Moses, Robert Muller, John Perticone, Keith Warren, Richard Williams, and William Yatteau, because of their membership in, or activities on behalf of U.A. Plumbers and Pipefitters Local Union #13, or any other union;

(h) In any like or related manner interfering with, restraining or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Within 14 days from the date of this Order, offer Trevor Claffey full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Within 14 days from the date of this Order, offer James Boehler, Stephen Catalina, James Caternolo, Steve Cirrincione, Lonnie Keys, Harry Moses, Robert Muller, John Perticone, Keith Warren, Richard Williams, and William Yatteau reinstatement to the positions for which they applied, or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges.

⁵ If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(c) Within 14 days of the date of this Order, make whole Trevor Claffey, James Boehler, Stephen Catalina, James Caternolo, Steve Cirrincione, Lonnie Keys, Harry Moses, Robert Muller, John Perticone, Keith Warren, Richard Williams, and William Yatteau for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth above in the remedy section of this decision.

(f) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Trevor Claffey, and within 3 days thereafter notify him in writing that this has been done and that the discharge will not be used against him in any way.

(g) Within 14 days from the date of this Order, remove from its files any reference to the unlawful refusal to hire, or consider for hire, James Boehler, Stephen Catalina, James Caternolo, Steve Cirrincione, Lonnie Keys, Harry Moses, Robert Muller, John Perticone, Keith Warren, Richard Williams, and William Yatteau, and within 3 days thereafter notify them in writing that this has been done and that the refusal to hire or consider for hire will not be used against them in any way.

(f) Preserve and, within 14 days of a request, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic fashion, necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its office in Hilton, New York, and at all of its job sites, copies of the attached notice marked "Appendix."⁶ Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced or covered by any other material. In the event that during the pendency of these proceedings, Respondent has gone out of business, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all employees and former employees employed by Respondent at any time since March 19, 2002.

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. June 24, 2004

⁶ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join or assist a union.

Choose representatives to bargain with us on your behalf.

Act together with other employees for your benefit and protection.

Choose not to engage in any of these protected activities.

WE WILL NOT tell our employees or employee-applicants that our policy restricting job applicants from entering our premises is the way that we remain nonunion.

WE WILL NOT interrogate our employees or employee-applicants about their union activities.

WE WILL NOT tell our employees or employee-applicants that they should not talk to, or accept literature from, union representatives.

WE WILL NOT threaten our employees with discharge because of their union activities.

WE WILL NOT threaten our employees with reprisals if they do not report the union activities of other employees.

WE WILL NOT discharge or otherwise discriminate against our employees because of their union activities.

WE WILL NOT refuse to hire, or refuse to consider for hire, employee-applicants because of their union activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of your rights as guaranteed by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer to Trevor Claffey full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL, within 14 days from the date of the Board's Order, offer employment to James Boehler, Stephen Catalina, James Caternolo, Steve Cirrincione, Lonnie Keys, Harry Moses, Robert Muller, John Perticone, Keith Warren, Richard Williams, and William Yatteau, to the positions for which they applied for employment, or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges.

WE WILL make whole Trevor Claffey, James Boehler, Stephen Catalina, James Caternolo, Steve Cirrincione, Lonnie Keys, Harry Moses, Robert Muller, John Perticone, Keith Warren, Richard Williams, and William Yatteau for any loss of earnings and other benefits resulting from the discrimination against them, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Trevor Claffey, and WE WILL notify him in writing that this has been done and that his discharge will not be used against him in any way.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful refusal to hire or refusal to consider for hire James Boehler, Stephen Catalina, James Caternolo, Steve Cirrincione, Lonnie Keys, Harry Moses, Robert Muller, John Perticone, Keith Warren, Richard Williams, and William Yatteau, and WE WILL notify them in writing that this has been done and that the refusal to hire or consider for hire will not be used against them in any way.

CNP MECHANICAL, INC.